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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH EVANS, Defendant and Appellant.	B168978 (Los Angeles County Super. Ct. No. BA224285)
In re JOSEPH EVANS, on Habeas Corpus.	B179434

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul M. Enright, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed as modified.

Original proceeding; application for a writ of habeas corpus. Petition denied.

Jill Lansing, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, Stephanie A. Miyoshi, Deputy Attorney General, for Plaintiff and Respondent.

Following a jury trial, appellant Joseph Evans was convicted of two counts of the attempted premeditated murders of Clifton Jacobs and Tynisa Meyi (Pen. Code, § § 664/187(a), counts 1 and 2) on March 21, 2001, and two counts of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b), counts 3 and 4), involving the same victims and same incident.[1] Appellant, who was represented at trial, but in pro. per. for the new trial motions and sentencing, appeals the judgment of conviction.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

On March 21, 2001, Tynisa Meyi and her then boyfriend Clifton Jacobs were walking on 43rd Street between Hoover and Figueroa, Rolling 40's Crips territory, when they were shot at by someone who had been riding in a gray vehicle that drove past them slowly, turned around, and returned in the opposite direction. The passenger, Antwon Lilly, got out of the car, asked "Where you all from," and without hearing a reply started shooting.[2] Jacobs pushed Meyi out of the way and she ran to her grandmother's house on the same street. She returned to her own house two doors away; her sister called the paramedics for the victim, who was shot in the arm and bleeding heavily. Police officers

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code. Appellant was sentenced to life on count 1, with a consecutive 25 years to life sentence for the principal's use of a gun (Pen. Code, § 12022.53, subd. (d).) A one-year term pursuant to section 12022, subdivision (a)(1) and 20 years pursuant to section 12022.53, subdivision (c), were stayed pursuant to section 654. As to count 2, the court imposed a concurrent life sentence; a concurrent 20 years pursuant to section 12022.53, subdivision (c), and the additional one-year for section 12022, subdivision (a)(1), were stayed pursuant to section 654. The gang allegations were stricken as to count 1 and 2. Midterm sentences on counts 3 and 4 were imposed and stayed pursuant to Penal Code section 654. This court requested clarification from counsel of the discrepancies in sentencing as set forth between the oral pronouncement in the reporters transcript and that in the clerk's transcript and abstract of judgment. The sentencing set forth in this footnote corresponds with their stipulation, which with minor exceptions explained by counsel, tracks the oral pronouncement. To the extent the clerk's transcript and abstract of judgment differ from the sentencing imposed, they shall be modified to reflect the sentencing set forth herein.

[2] Meyi knew this to mean "What hood you from."

also arrived and, still high from PCP and cocaine, Meyi told them the car involved was grey; she described the shooter as dark skinned.[3] After testifying against Lilly, the shooter, Meyi was shot at again and had to be relocated, without her children.[4]

The People's theory was that the shooting by appellant's passenger, Lilly, was gang retaliation by the Rolling Thirties for a shooting by a rival gang, the Rolling 40's. The shooting, on the same day as a funeral or wake for the Rolling Thirties gang member, was in Rolling 40's territory, where victim Jacobs, not a member of that gang, happened to be visiting his girlfriend. Two bullets struck Jacobs, but Meyi was not hit.

Within minutes after the shooting, appellant was arrested after officers detained him after noticing expired registration tags on the Arizona license plates and watching the car go through one or two stop signs, including making a left turn without stopping. When the vehicle stopped, the passenger, Antwon Lilly, exited the vehicle and fled with a gun he placed into his waistband.[5] At some time during the pursuit, or after appellant was prone and handcuffed, the pursuing officers heard the radio transmission about the subject shooting and a description of the grey vehicle involved. Within an hour, Lilly was tracked with a canine unit and was found a few blocks away. Appellant, the driver,

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[3] An officer who interviewed Meyi the night of the shooting and transported her to the hospital to visit her boyfriend testified she did not appear to be under the influence of anything. Clifton Jacobs also did not display symptoms of using PCP.

The court noted at sidebar that Meyi "is obviously under the influence of something right now." The prosecutor commented that the witness had been traumatized "for numerous reasons, some having absolutely nothing to do with this case," and "always behaves like this . . . ." Defense counsel stated he would impeach the witness if the prosecutor tried to prove she went through a rehab. The witness testified both her ear drums were busted and she did not feel good at all while testifying.

[4] Meyi did not want to testify. She felt her life was on the line.

[5] The officer who followed him on foot broadcast that there was a foot pursuit, but did not mention a weapon.

stayed in the car and was detained and handcuffed in a prone position after responding slowly to the arresting officer.

In custody later that night, Lilly was advised of his *Miranda* rights and in a taped statement told the police that he and appellant had been at a funeral following which appellant picked Lilly up in the grey vehicle, gave him the gun, and told him to shoot the victims.[6] Lilly stated he did so out of fear.[7] A funeral pamphlet, cell phone, stocking cap, and shirt were found in the car.[8] Six casings from a .9 millimeter semiautomatic handgun were found, without fingerprints; but the gun was never recovered. A bandana and jacket, like the one Lilly had been wearing, were found not far from where Lilly was located.

Victim Meyi was taken to a field show up and saw a grey car that could have been the one in the incident. According to an officer who took her to the show-up and testified Meyi did not display symptoms of being under the influence of PCP, Meyi quickly identified the car and appellant as the driver.[9] At trial Meyi was not sure if she identified

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[6] The funeral was for a Rolling Thirties gang member, Kendale Deshawn Decquir, also known as "Little Yodi," who had been shot to death. Even his funeral pamphlet contained a picture of a person flashing a Rolling 30's gang sign. The victims in the case at bench were in the territory of rival Rolling Forties gang and have gang ties, Jacobs to the East Coast Crips, and Meyi, known as "Lil Mama" to the Rollin 40's. Appellant was a member of the Rolling 30's gang; Lilly lived in 30's gang territory.

[7] Lilly, 17 years old at the time of the shooting, agreed to testify in exchange for 17 years in state prison.

[8] The cell phone displayed "Harlem" or "Harlem Crips" when turned on. The Rolling 30's Crips, appellant's gang, is also known as the Harlem 30's. "H.I.P." (Harlem in Peace) was tattooed on Kendale Deshawn Decquir.

The trial court excluded admission of photographs developed from a camera found in the car. Those photographs, developed on the eve of trial, included pictures of Rolling 30's gang members including appellant throwing gang signs at the funeral.

[9] The parties stipulated that the 1999 gray Chevrolet Malibu was a rental car owned by Avis Rent-A-Car and rented to someone other than appellant.

appellant as the driver and did not know if he was one of the two involved in the shooting. She had seen appellant before in a context different from this incident and knew him by the name Biddi-B. She never saw the driver get out of the car. Jacobs could not identify the driver and told police both victims were under the influence of PCP at the time of the shooting.

Gunshot residue (GSR) tests were done that night on both appellant and Lilly. Appellant was arrested about 12:40 a.m., and the tests were done between about 1 and 2 a.m. when they were at the station. Gunshot residue was not detected on either appellant or on Lilly. An expert testified that, if a shooter handed a gun to a nonshooter, it is less likely that the second person would have gunshot residue on his hands. Over 95 percent of the residue dissipates in the first hour; physical activity would also dissipate the residue.

Lilly, facing three consecutive life sentences, pleaded guilty to one count of attempted murder and another count of assault with a firearm for a sentence of 17 years in state prison. As part of his plea bargain, Lilly agreed to testify truthfully at appellant's trial, with his credibility to be determined by the judge.

Lilly, who denied being in a gang,[10] testified that he did not attend a funeral but saw appellant, a member of the Rollin 30's, sometime after midnight on March 21, 2001. They were hanging out and got into a car to get "blunts" (cigars) at a local gas station. On the way back home, appellant showed him a gun, told him to stay put or be shot, and said "We are gonna go smash us some enemies," which meant to "fight , fill, hurt someone." Lilly, who had never killed anyone before, just looked at him. Appellant lived in Rollin 30's territory but drove into rival Rollin 40's territory and, seeing two people on the street, said "There goes some right there" and made a U-turn. Appellant

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[10] Lilly testified he had no gang tattoos. His only tattoos were the names of his grandfather and his mother. However, the People's gang expert testified that he considered Lilly to be a member of the Rolling 30's.

told Lilly "You are about to dump on some enemies," meaning Lilly was going to have to hurt someone; Lilly testified he was "forced at gunpoint."

After making the U-turn, appellant gave Lilly the gun, told Lilly to "Go blast me some enemies," and said the gang name of a person and "Rest in peace." Lilly approached the two people, did not say anything, and fired the handgun four or five times.[11] Lilly understood appellant's words to mean that the shooting was in retaliation for the gang person who had been killed. As appellant began to drive off, Lilly ran to the car and entered the open door. Appellant told Lilly "We are going to go dump on some more enemies" but Lilly told him "we ain't going to do nothing." They returned to the area near Lilly's house. Appellant told Lilly that if the police came, he should jump out and run away with the gun.

Lilly fled the police and was found under a house by police dogs.[12] He identified his jacket, which the police found, but not the blue bandana, which he identified as being a color identified with Crips gang members.

Lilly asked to call his parents, but they were not home and the police then questioned him. Lilly was given his *Miranda* rights but claimed at trial that he was under the influence of PCP and did not understand them.[13] Nevertheless, he stood by his confession, which was played to the jury, and subsequently testified his rights were read

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[11] Lilly testified he did not remember what he did with the gun. He testified it was on the floor of the car and appellant took it off the floor. When they saw police, appellant told Lilly to take the gun. Lilly jumped out of the car with the gun and ran with it towards his home. The gun fell at some point.

On cross-examination, Lilly testified that he knew victim Clifton Jacobs from playing football at age 14. However, he did not know who either victim was when he shot at the couple.

[12] Lilly claimed the dogs bit him. The arresting officer denied any bites.

[13] The court remarked that "This business about being on P.C.P. does throw kind of a knuckle ball into it."

to him and he had pretty much come down by the time the police interviewed him hours after the shooting. He also testified that the police told him "he would go home" if he talked to him, but the transcript and tape do not reflect any such representation.

Lilly testified he was afraid of appellant at the time of the shooting and did the shooting only because he was fearful for his own life and his family's. At trial, he was still afraid for his life and his family's life. He had been beaten twice following his arrest. Rollin 30's gang members also threatened him, stating they would kill his family if he were to "tell on their homie."[14] While Lilly was in the general jail population, appellant, whom he knew as Biddi-B, told Lilly "that if I don't testify against him, that he ain't going to have nobody do nothing to me."

Appellant did not testify. The People provided evidence of his membership in the Rolling 30's gang.

The principal defense was that Lilly, who was the actual shooter and made a taped confession a year before his plea bargain with the prosecution, implicated appellant in order to lessen his own sentence. In 1998, when Lilly was in a residential group home for boys, he told a childcare worker that he was a Crips gang member. Contrary to his testimony at trial, in 1998, Lilly told an officer he got the stolen car he was driving "from some basehead." In 1999, Lilly blamed his grand theft auto charge on another minor when talking to a probation officer. Thus, the defense argued that Lilly was a liar who did not take responsibility for his actions and instead blamed others; furthermore, he was under the influence of PCP and marijuana at the time of the shooting.[15] In contrast,

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[14] Such evidence was limited to explain the witness's demeanor while testifying. Lilly was impeached with his conduct at age 14 or 15 in driving a stolen vehicle in 1998. He denied telling the police he got the car from some "base head," a bum living on the street. An officer called by the defense contradicted Lilly's version, testifying that upon being stopped Lilly, then a juvenile, told the officer "I got it [the stolen vehicle] from some basehead." The officer found a slide hammer underneath the seat.

[15] During posttrial motions, the court noted that Lilly was "substantially impeached at trial. And even the District Attorney in their closing argument impeached him."

appellant pulled over when stopped by the police, did not flee the scene, and was not under the influence.

Moreover, Tynisa Meyi, the only prosecution eyewitness,[16] testified she had smoked PCP rolled up with cocaine and marijuana half an hour before the incident. The defense brought out her history with PCP, including a prior overdose, and that she suffered from "illusions and delusions." She thought they were trying to have her identify the shooter.

The defense expert on PCP, Dr. Benjamin Margolis, had never met either Meyi or Lilly and had not reviewed the police reports in the case at bench or the tape of Antwon Lilly's statement.

The court did not allow a deputy sheriff to testify as to threats made by Lilly to other inmates, which the deputy did not hear but used as a basis to terminate Lilly's privileges as a trustee, or that Lilly thereafter became agitated and stared down the deputy which the deputy took as a threat. The supervising deputy at the criminal courthouse lockup testified that on June 18, 2002, the date of Lilly's guilty plea, there was a special handling request for Lilly, based on reports that Lilly was testifying against appellant in a 187 case and feared for his safety and claimed to have been assaulted behind this case. No source of the request for special treatment was listed, and there was no mention that appellant made any threats or promises to stop assaults if Lilly did not testify. There was a stipulation that the judge presiding over Lilly's plea agreement issued an order that day that the jail should keep Lilly away from appellant.

Following trial, appellant proceeded in pro. per. for posttrials motions, which took months to resolve. In the final hearing, appellant himself testified regarding his feeling he should have had the right to testify. According to appellant, after the prosecution rested its case, including the testimony of Antwon Lilly, appellant felt it was in his best interest to testify and asked co-counsel to tell attorney Moore to call appellant as a

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[16] Clifton Jacobs apparently did not respond to his subpoena.

witness. Appellant then recollected that co-counsel leaned over and said "Tom, Joseph wants to testify," to which attorney Moore replied "No, the D.A. will impeach you with your juvenile history. I'm not going to call you."

Attorney Moore did not remember that specific conversation, but did not dispute it. His recollection was that he and appellant had discussed the possibility of appellant's testifying on a few occasions, starting at their first meeting and including through trial. Moore consistently advised him not to testify. Appellant expressed a desire to testify. Attorney Moore explained the reasons appellant should not testify, and appellant agreed. Had he not agreed, counsel would have let him testify. If the conversation recalled by appellant had occurred, they would have discussed it; Moore would have advised against testifying and appellant's "agreement not to testify would have been the result." They had gone over appellant's entire record, and that could have been one of Moore's reasons not to call him.

Appellant replied that he would have been the best witness to refute Lilly's testimony and was willing to testify. He argued that "at no time" did he and Moore "speak about it" with appellant agreeing not to be called.[17] Rather, he took counsel's advice and it was a "prejudicial decision." He also was concerned that jurors said their deliberations were extremely hard because they had not heard from appellant, which appellant took as a demonstration of prejudice. Appellant asked to testify as to the events of the night of the shooting, but the court did not want to get into that area.

CONTENTIONS ON APPEAL

Appellant contends: 1. Appellant was deprived of due process under the Fifth and Fourteenth Amendments because the prosecution relied on an involuntary confession from a third party. 2. Counsel's advice that appellant not testify was not tactically justified and deprived appellant of the effective assistance of counsel. 3. Appellant was

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[17] On the other hand, appellant also admitted they had argument about whether he would testify and spoke of it "numerous times."

deprived of the right to present a defense as a result of defense counsel's decision not to call David Penny as a witness. In a related petition for habeas corpus (*In re Joseph Evans*, B17934, filed November 29, 2004), appellant again argues ineffective assistance of counsel.[18]

DISCUSSION

1. The statement and testimony of Lilly were properly admitted.

In his posttrial motions, appellant argued that he was deprived of Fifth Amendment rights and due process protection of the law and a fair trial by the admission of Lilly's tape-recorded confession, which appellant contended was involuntarily made in violation of Lilly's *Miranda* rights and also "due to his drug-induced statement and also the promise of leniency by the arresting officers when they promised to release him in exchange for him making a statement."

Relying on Lilly's testimony and cross-examination at trial, and citing *People v. Badgett* (1995) 10 Cal.4th 333, 347, the trial court denied the motion regarding Lilly's pretrial coercion. The court concluded that "the testimony that was produced at trial did not appear to be coerced" and denied the motion for new trial to the extent it was based on that issue.

Appellant argues that Lilly's statement was involuntary because he was a 17-year-old under the influence of drugs and because the police promised they would release him if he implicated appellant. Respondent argues that the issue was waived for failure to object to the admission of Lilly's confession and failure to file a suppression motion.[19] Moreover, respondent contends that Lilly's statement and subsequent testimony were not

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[18] We have reviewed the petition, *In re Joseph Evans* B179434, which alleges ineffective assistance of counsel for refusal to permit appellant/petitioner to testify or, at a minimum, his advice not to do so as well as for failure to call David Penny as a witness. We shall deny that petition.

[19] We do not discuss the issue of waiver but conclude the Lilly's statement and testimony were properly admitted.

involuntary and, in any event, any error in admitting the evidence was harmless beyond a reasonable doubt.

Reviewing either the claim that an agreement was coercive and the third party's testimony was improperly admitted, the appellate court reviews the entire record and reaches an independent judgment whether the agreement was coercive and whether defendant was deprived of a fair trial. (*People v. Badgett, supra,* 10 Cal.4th 330, 350.) The record does not support appellant's assertion that Lilly's statement or his trial testimony was coerced or unreliable.

We have reviewed the transcript of the taped interview. First, Lilly's lucid responses belie the claim that any drugs he had used prior to the shooting impaired his ability to make a voluntary statement. Second, there is no indication of a promise to let Lilly go if he implicated appellant. The officer testified that Lilly was not promised a certain number of years or a certain sentence if he implicated appellant or admitted the crime himself. Given Lilly's own lack of credibility on many issues, his testimony at trial regarding any promises as well as the proposed testimony of David Penny that Lilly said such promises were made need not be believed. To be sure, when the interviewing officer told Lilly that detectives would be talking to him "in the morning," Lilly did not object that he was to be let go, rather, his request was to talk to his mother, saying "I know she's -- she's going to be so upset."

Moreover, our Supreme Court has discussed the admissibility of trial testimony of a witness who was subjected to coercion in making a prior confession. In *People v. Badgett*, *supra*, 10 Cal. 4th 330, 347-348, in which the coercive nature of the trial testimony of a 17-year-old who had made pretrial admissions implicating defendants after offers of leniency and in exchange for an immunity agreement requiring her to testify truthfully was at issue, the court distinguished admissibility of testimony following a coerced statement by defendant and a coerced statement by a third party witness: "When the defendant seeks to exclude the fruit of the coerced statement of another, however, the policy of protecting the defendant from being compelled to aid the state in

convicting him is not at stake. There is no danger that through the testimony of a third party, the burden of proof imposed on the state will be lightened. Thus, the principal reason for excluding evidence taken in violation of the privilege against self-incrimination, including successive, involuntary statements is simply not applicable in this instance. [¶] Although courts analyzing claims of third party coercion have expressed some concern to assure the integrity of the judicial system (see, e.g., *United States v. Chiavola* (7th Cir. 1984) 744 F.2d 1271, 1273; *United States v. Fredericks* (5th Cir. 1978) 586 F.2d 470, 481, & fn. 14; *LaFrance v. Bohlinger* (1st Cir. 1974) 499 F.2d 29, 32-34), the primary purpose of excluding coerced testimony of third parties is to assure the reliability of the trial proceedings, as we recognized in [*People v. Douglas* (1990)] 50 Cal.3d 468, 500. There, we explained, the defendant's emphasis on pretrial coercion 'misperceives the limited nature of the exclusion recognized for coerced third party testimony. [Citation.] Because the exclusion is based on the idea that coerced testimony is *inherently unreliable*, and that its admission therefore violates a defendant's right to a fair trial, this exclusion necessarily focuses only on whether the evidence actually admitted was coerced. . . . [D]efendant can prevail on his suppression claim only if he can show that the trial testimony given by [the third party] was involuntary at the time it was given.' (*Ibid.*, italics added, italics in original omitted.) [¶] The purpose of exclusion of evidence pursuant to a due process claim such as defendants' is adequately served by focusing on the evidence to be presented at trial, and asking whether *that evidence* is made unreliable by ongoing coercion, rather than *assuming* that pressures that may have been brought to bear at an earlier point ordinarily will taint the witness's testimony." (Accord *People v. Jenkins* (2000) 22 Cal.4th 900, 966- [applying *Badgett* to demonstrative evidence].)

Furthermore, unlike the situation where defendant's admissions or confessions are at issue, when the allegedly coerced testimony of a third party on due process grounds is at issue, "the burden of proving improper coercion is upon the defendant ([*People v. Douglas* (1990)] 50 Cal.3d [468, 500].)" (*Badgett*, *supra*, 10 Cal.4th 330, 348.) In

addition "a defendant must demonstrate that trial testimony following the coercion of a witness was actually tainted thereby." (*Ibid.*) We have reviewed the full record and conclude that appellant did not carry his burden of proving coercion. Thus, both Lilly's statement and his testimony were properly admitted.

2. Counsel's advice that appellant not testify was tactically justified.

Appellant argues that he was not advised that he had an absolute right to testify and that his counsel's advice for him not to testify was not tactically justified and deprived him of effective assistance of counsel.

The right to testify on one's behalf, even if a foolish decision is well established. "We are satisfied that the right to testify in one's own behalf is of such fundamental importance that a defendant who timely demands to take the stand contrary to the advice given by his counsel has the right to give an exposition of his defense before a jury. (*People v. Blye*, 233 Cal.App.2d 143, 149 [43 Cal.Rptr. 231].) The defendant's insistence upon testifying may in the final analysis be harmful to his case, but the right is of such importance that every defendant should have it in a criminal case. Although normally the decision whether a defendant should testify is within the competence of the trial attorney (see *People v. Gutkowsky*, 219 Cal.App. 2d 223, 227 [33 Cal.Rptr. 79]), where, as here, a defendant insists that he wants to testify, he cannot be deprived of that opportunity." (*People v. Robles* (1970) 2 Cal.3d 205, 215, fn. omitted; accord *People v. Bradford* (1997) 15 Cal.4th 1229, 1332.)

There is no indication from his trial attorney in the record on appeal that appellant was not advised of his right not to testify.[20] Rather, inferences from counsel's statements are that he and appellant discussed whether appellant should testify and, thus, that

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[20] A letter from trial counsel attached as an exhibit to appellant's writ petition (*In re Evans on habeas corpus* B179434, filed November 29, 2004) states "I clearly advised Mr. Evans that he had the absolute right to testify in his own behalf. Based on our discussions, my impression was that he understood this right. I did, however, counsel him against doing so. He agreed."

appellant knew he had such a right. One can conclude he chose to follow his attorney's advice until he was convicted and then thought he could not have done worse had he testified.

The attorney's advice was clearly tactical. We disagree with appellant's assertion that, without appellant's testimony, "conviction was a foregone conclusion." Defense counsel had done an excellent job discrediting Antwon Lilly. The jury deliberated for several days, unusual given the nature of the crimes and the noncomplex factual decisions to be made. Defense counsel's decision to rely on the weaknesses in the People's case and to discredit its witnesses rather than call appellant was a rational tactical choice.

Appellant's reliance on *People v. Andrade* (2000) 79 Cal.App.4th 651, affirming new trial where defense counsel had advised defendant did not testify, is misplaced. The trial court in *Andrade* granted a new trial and Division Six of this court, applying the appropriate standard of appellate review, affirmed the trial court's exercise of discretion. In the case at bench, the trial court heard testimony and decided defense counsel had not been ineffective in making the tactical decision that appellant should not testify. The trial court's decision was amply supported and not an abuse of discretion.

3. Appellant was not deprived of the right to present a defense as a result of defense counsel's decision not to call David Penny as a witness.

In pretrial discussions, defense counsel revealed his theory regarding the testimony of David Penny, a witness ordered out from Wasco State Prison "sort of known as the . . . local expert courthouse lawyer . . . ." His offer of proof was that the shooter in the instant case, Antwon Lilly, 18 years old at the time of trial, spoke to Penny before pleading guilty and taking a deal in exchange for his testimony against Evans, the driver of the car. Lilly "apparently spoke to David Penny and asked him questions about how his case looked and if he asserted, for instance, that Mr. Evans forced him to do it and did Mr. Penny think that that was a good defense. [¶] In essence, Mr. Penny would testify that Mr. Lilly concocted a defense in order to get a deal" and "That was a lie." Further, the offer was that Lilly insinuated that someone else, not Evans, forced him to do it.

Defense counsel added: "To be frank, I may not call Mr. Penny." The court remarked that "Inmates don't come across too good" and "They usually lack credibility for some reason," but left the decision to defense counsel.

The prosecutor subsequently stated that she anticipated "that David Penny is going to come from State Prison and testify that Antwon Lilly told him that the police put him up to making this confession and pinning it on Evans. If he does that, the whole intimidation thing [alleging Lilly was beaten and intimidated in prison] is really relevant because it shows why he [Lilly] has a reason to recant." Moreover, "If it turned out that David Penny is a Rolling 30's, or if he's somehow an acquaintance of Evans, then there is a direct link and there may have been intimidation by this David Penny or some other Rolling authorities."

In the middle of Lilly's testimony, the prosecutor again brought the court's attention to David Penny, stating she might have to recall Lilly if Penny testified for the defense. Defense counsel apologized for interrupting and stated he did not believe he would be calling Penny.

After appellant discharged his attorney and proceeded in pro. per., he sought a court order for his investigator to interview David Penny; the court so ordered. The court even offered to call the investigator and tell him to visit appellant in jail. At the next court appearance, appellant was given a copy of the investigator's interview with Penny.

Appellant then sought all attorney room visits for David Penny between September 5 and 11, 2002, from visitors. He sought to prove that someone from the prosecution's office went to Twin Towers the second day of trial and discouraged Penny from testifying. The court stated it had spoken to appellant's trial counsel, who stated Penny was a witness the defense had under subpoena and that Penny was willing to testify at appellant's trial.[21] The court agreed to allow the subpoena.[22] The court also

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[21] According to appellant, he had seen Penny for a brief second in trial and Penny told appellant that an investigator from the D.A.'s office told him not to testify. The court reiterated that when defense attorney Moore spoke about Penny in chambers, "he

authorized a subpoena for UCLA Medical Center, appellant's former employer, to show appellant's character.

At a hearing on February 21, 2003, defense attorney Moore testified that he had interviewed Penny, who was available and willing to testify. Penny was still willing to testify during the trial and "after the deal." The court left defense counsel's decision not to call Penny for another day.

At a hearing on April 18, 2003, appellant announced he had prepared his motion for new trial and an additional ex parte motion. He informed the court that his investigator was interviewing Penny once again, which might prompt a supplemental motion.

On June 13, 2003, the prosecution responded to appellant's claims of vindictive prosecution[23] and the alleged coerced statement of Mr. Lilly. At the hearing on July 1, 2003, the failure to call David Penny was among the grounds at issue. A tape of an interview with Penny made on September 11, 2002, was produced, as was the investigator who interviewed Penny. According to the prosecutor, Penny, who was doing 32 years to life, stated he was in prison at Calipatria and preferred being there to being housed in county jail; in addition, he did not want to testify against a gang member

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was very troubled by the potential harm Mr. Penny could do to the defense case." Furthermore, the court observed that defense counsel brought in witnesses for the defense and "It would have been no trouble to get Penny on the stand. Penny was in the building. . . . He certainly had some other witnesses that were much more difficult to get a hold of than Mr. Penny." According to the trial court, the decision not to call Penny was "tactical."

[22] When the documents appeared in court, one showed a visit to Penny by an investigator for the District Attorney's office.

[23] The case against appellant was initially rejected. The prosecution first stated it decided to wait until after Lilly's preliminary hearing to file charges against appellant. The deputy district attorney then corrected the record and stated they were gathering evidence to prepare for Lilly's preliminary hearing and trial when the decision was made to file against appellant.

belonging to Lilly's gang, with Penny's mother telling him not to testify against Lilly. The court stated there appeared to be no threats, the original basis for any defense attempt to exclude Penny's statement.

Edward Torres, investigator for the District Attorney's office, testified he interviewed Penny on September 11, 2002, regarding any information Penny might have about appellant and any conversations he had with Lilly or appellant. The investigator took notes and submitted a report and the notes to the deputy District Attorney. He recorded the conversation and gave the tape to the sound lab at the office of the District Attorney, probably the same day. The investigator did not tell or suggest to Penny that he should not get involved in appellant's case, nor did he threaten Penny in any way.

Appellant argued that he was deprived of exculpatory material in that he did not receive the tape until two weeks before the new trial hearing. The court agreed to listen to the tape again to determine if it contained any exculpatory information. The court listened to the tape and observed it was 30 minutes in length while investigator Torres testified their interview was 50 minutes; a pause button was hit during the interview, and there was conversation before the recording. Nevertheless, the court decided that listening to Penny's demeanor, "it doesn't appear anything untoward happened."

Appellant argued that Penny would have provided exculpatory evidence that the police coerced Lilly into implicating appellant and that the prosecutor's failure to provide the tape denied him due process and a fair trial. The prosecutor argued that the defense knew about David Penny and had subpoenaed attorney Moore to ask him questions about his actual knowledge. The court decided that was not necessary in light of Penny's statement on the tape that he "ran this whole thing down to Mr. Evans. I told him about the conversations with Mr. Lilly." Aside from there being no *Brady* violation, the court noted that the tape made clear that Penny "could be a detrimental witness for both sides . . . ."

Appellant's principal reason for calling Penny was to establish that Lilly was falsely implicating appellant and that Lilly's conversations with Penny substantiate that

appellant did not know Lilly had a gun, that Lilly was in a gang, and that Lilly killed someone during a "sherm attack." Moreover, according to Penny, Lilly said the police told him to implicate appellant. Penny also alleged that a prosecution investigator told Penny not to testify in appellant's case and that, if he did, it would adversely affect Penny's own case.

"Whether to call certain witnesses is also a matter of trial tactics, unless the decision results from unreasonable failure to investigate. [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297. As discussed above, defense counsel did an admirable job of discrediting the People's witnesses. Penny was a convicted felon who was serving a term of 32 years to life. Defense counsel made a reasonable judgment call that appellant was better served by the discrediting of Lilly through his own testimony than by that of David Penny, whose status as an inmate was not helpful and whose statement included that Lilly told Penny "one of his O.G. homey[s] made him" do it. Other notes state appellant indicated he was not a gang member, which was contradicted at trial and could be further disputed by more damaging evidence, such as a photograph from the funeral that had been excluded, if Penny were to testify. In addition, Penny's statements would at least in part have corroborated Lilly's statement that he was forced to shoot the victims by an older member of the gang and/or was arrested for something he and his "older homeboy" did. Penny's reasons for not testifying varied from not being called by defense counsel, to being threatened by the prosecution's investigator, to liking where he was and not wanting to come in and testify against a gang member. In short, David Penny may well have been less help to the defense than the defense's strategy of poking holes in the testimony of Lilly and the victim. Appellant has not demonstrated ineffective assistance of counsel, nor was he deprived of a defense by the tactical decision not to call David Penny.

DISPOSITION

The abstract of judgment and clerk's transcript shall be modified to reflect the sentencing set forth in footnote one. In all other respects, the judgment is affirmed.

The petition for writ of habeas corpus, *In re Joseph Evans* (B179434), is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P.J.

We concur:

BOLAND, J.

FLIER, J.